

## Applying Just War Theory as a Framework to Assess the Moral Legitimacy of Australia's Counter-Terrorism Laws

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### Abstract

*This paper adapts just war theory into a framework for assessing the morality of states' legislative responses to their international obligations to counter terrorism. The jus ad bellum principle is adapted to provide for its application as a framework to assess the moral legitimacy of counter-terrorism laws. The framework is then applied as a practical tool to assess the moral legitimacy of Australia's counter-terrorism laws. It is proposed that the framework could aid discussion and debate of the moral legitimacy of Australia's counter-terrorism laws, by providing a clearly defined set of standards for assessing the laws in a way that considers all relevant criteria. It is also proposed that the framework could be used to inform decision-making in the development and application of Australia's counter-terrorism laws. It is concluded that the framework could also be applied to assess the moral legitimacy of other states' legislative responses to counter terrorism, by evaluating the extent to which their laws are consistent with the adapted just war theory criteria.*

### Introduction

This paper adapts just war theory into a framework for assessing the morality of states' legislative responses to their international obligations to counter terrorism. Specifically, the *jus ad bellum* principle is adapted to provide for its application as a framework to assess states' counter-terrorism laws. The *jus ad bellum* criteria for assessing the legitimacy of engaging in war are adapted to enable an assessment of the legitimacy of the law-making process, as well as the requirements for the exercise of powers, and measures available, under counter-terrorism laws.

The framework is then applied to assess the moral legitimacy of Australia's counter-terrorism laws. In applying adapted just war theory criteria, this paper assesses Australia's counter-terrorism laws against moral standards that incorporate what Carne describes as 'critical rule of law principles such as restraint, accountability, proportionality, necessity and due process, which are embedded in the institutions and practices of commonly accepted notions of

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<sup>1</sup> The author previously held legal roles in the Australian Public Service and was Adviser to the former Independent National Security Legislation Monitor, Bret Walker SC, from 2011 to 2014. The views expressed in this paper are the author's personal views. The author would like to acknowledge the helpful comments of the anonymous reviewers.

liberal democratic representative and participatory democracy'.<sup>2</sup> This paper concludes that Australia's counter-terrorism laws can be read as consistent with just war theory.

It is proposed that the framework could aid discussion and debate of the moral legitimacy of Australia's counter-terrorism laws, by providing a clearly defined set of standards for assessing the laws in a way that considers all relevant criteria. It is also proposed that the framework could be used to inform decision-making in the development and application of Australia's counter-terrorism laws. It is concluded that the framework could also be applied to assess the moral legitimacy of other states' legislative responses to counter terrorism, by evaluating the extent to which their laws are consistent with the adapted just war theory criteria.

### Why just war theory?

Since the terrorist attacks in the United States on 11<sup>th</sup> September 2001, Australia has enacted and applied domestic counter-terrorism laws<sup>3</sup> to comply with its international obligations under United Nations (UN) Security Council Resolution 1373 (1373). This Resolution requires UN Member States to take measures to ensure terrorism is prevented and punished as a serious crime under domestic law.<sup>4</sup>

Public and parliamentary debate about Australia's counter-terrorism laws has primarily focused on the broader moral and human rights concerns raised by the laws, rather than on black letter law issues. Commentators have sought to assess the legitimacy of Australia's counter-terrorism laws with questions such as: Are they fair? Do they protect rights? Are they reasonably necessary to protect society?

These are valid questions and public and parliamentary discussion and debate of them is important. This paper explores how discussion of the moral justifications for the laws can be aided by a clearly defined set of standards for assessing them in a way that considers all relevant criteria. One way to do this is through assessing the laws against just war theory.

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<sup>2</sup> G Carne, 'Detaining Questions or Compromising Constitutionality?: The *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth)' *University of New South Wales Law Journal* (2004) 27, 577-578 at 524. Carne describes the need for Australia's counter-terrorism laws to comply with these principles.

<sup>3</sup> Australia's 'counter-terrorism and national security legislation' is defined in section 4 of the *Independent National Security Legislation Monitor Act 2010* (Cth). These laws include provisions of the *Australian Security Intelligence Organisation Act 1979* (Cth), *Charter of the United Nations Act 1945* (Cth), *Crimes Act 1914* (Cth), *Criminal Code Act 1995* (Cth), *Defence Act 1903* (Cth) and *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

<sup>4</sup> UN Security Council Resolution 1373: *Threats to international peace and security caused by terrorist acts*, adopted on 28<sup>th</sup> September 2001, obliges all United Nations Member States (which includes Australia) to criminalise terrorism. See in particular para 2(e) where the Security Council decides that all Member States shall: 'Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts'. Decisions of the United Nations Security Council (acting under Chapter VII of the *Charter of the United Nations*) are legally binding upon all United Nations Member States under Article 25 of the *Charter of the United Nations*, which stipulates that Member States agree to accept and carry out the decisions of the United Nations Security Council. The claimed power for United Nations Security Council Resolution 1373 is Article 39 of the *Charter of the United Nations*, which provides that the Security Council 'shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 [non-armed measures] and 42 [armed measures], to maintain or restore international peace and security'. Australia also has international obligations to have counter-terrorism laws by virtue of its treaty obligations under United Nations counter-terrorism treaties, such as the *International Convention for the Suppression of the Financing of Terrorism* (New York, 1999), (ratified by Australia on 26<sup>th</sup> September 2002).

This paper considers just war theory as a heuristic construct capable of being adapted into a framework for assessing the morality of counter-terrorism laws.<sup>5</sup> To this end, the *jus ad bellum* principle is adapted to provide for its application as a model framework for assessing states' domestic counter-terrorism laws. Australia's counter-terrorism laws provide a case study of how this framework can be applied, and the benefits and limitations of its application.

This paper seeks to demonstrate the value of just war theory as a model for assessing states' domestic counter-terrorism laws. States have applied just war theory principles in the development of international law, for example, in the development of international humanitarian law (which reflects the principle of *jus in bello*) and the *Charter of the United Nations* (UN Charter) (which is underpinned by the principle of *jus ad bellum*).

An adapted just war theory framework allows for diverse stakeholders' perspectives on the laws to be taken into account through a framework that considers both legal and moral criteria. While opinions may differ between interested persons as to the proper evaluation of whether a law is just or unjust, such a framework provides a means through which any interested person can debate moral considerations. A just war theory-based approach has the benefit of providing a framework through which multiple stakeholders can bring different perspectives, while providing a relevant, common and useful set of evaluation criteria. It is contended that a just war theory-based framework encompasses all of the key areas of concern for legislative decision-makers in liberal democratic states when they are assessing proposed or existing laws and legal policies.

Explanatory material accompanying proposed counter-terrorism laws routinely use terms such as 'necessary' and 'proportionate' to demonstrate the legitimacy of the proposals.<sup>6</sup> The complementarity of such terms with the criteria of just war theory is evident. The criteria of last resort and prospects of success are explicitly applied in the text of Australia's counter-terrorism laws (as discussed below). Again, the complementarity with just war criteria is evident. The complementarity of the mandatory Statement of Compatibility with Human Rights (which must accompany all new counter-terrorism law proposals) with just war criteria is also evident. For example, just war theory criteria is central to the human rights questions addressed in the Statement of Compatibility with Human Rights which accompanies the *National Security Legislation Amendment Bill (No 1) 2014*.<sup>7</sup>

### **An adapted just war theory framework: applying the *jus ad bellum* principle to assess Australia's counter-terrorism laws**

Just war theory sets out three fundamental principles for assessing the moral legitimacy of war, with rules governing each of these principles:

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<sup>5</sup> For further discussion of just war theory's adaptability as a framework for delineating and considering the issues and aspects of morality of wars and methods of warfare see W Murnion 'A Postmodern View of Just War' in S Lee (ed) *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory* (Springer 2007), 23-40.

<sup>6</sup> For example, in relation to the proposed Special Intelligence Operations (SIOs) scheme for ASIO officers and 'affiliates' (discussed below) the Explanatory Memorandum states 'The scheme is necessary to ensure the effective performance of the statutory functions of ASIO. Not providing these immunities would impair ASIO's capabilities to ensure a safe and secure Australia and expose individuals to liability for necessarily participating in actions to fulfil their role with regards to ASIO... The limitation to the right to an effective remedy and a fair hearing is only limited to the extent that it is reasonable, necessary and proportionate to achieve the objective of facilitating the fulfilment of ASIO's statutory functions' (emphasis added). *Explanatory Memorandum, National Security Legislation Amendment Bill (No 1) 2014*, 17-18

<sup>7</sup> Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

- just reasons for engaging in war (*jus ad bellum*): governing the legitimacy of going to war;
- just conduct during war (*jus in bello*): governing the legitimacy of actions during war; and
- just conduct after war (*jus post bellum*): governing the legitimacy of actions taken after war.

It is the *jus ad bellum* principle that forms the basis of the framework proposed. Steinhoff identifies six distinguishing criteria that practitioners of just war theory have typically used to determine whether it is justified to enter a war (*jus ad bellum*).<sup>8</sup> These can be summarised as:

- 1) a legitimate authority decides on the entrance into war;
- 2) there is a just cause for entering into a war;
- 3) the war is pursued with the right intention;
- 4) the war fulfils the condition of proportionality;
- 5) the war fulfils the condition of having prospects of success; and
- 6) the war is a last resort.

The author has adapted these six criteria to provide a framework to assess a) the law-making process for Australia's counter-terrorism laws, b) the requirements for the exercise of powers under the laws, and c) the measures available under the laws. By doing so, the author seeks to demonstrate the value of a just war theory-based approach and to show how Australia's counter-terrorism laws can be read as consistent with the principle of *jus ad bellum*. The challenges and benefits of applying the framework are discussed, as is the potential application of the framework to other states' legislative responses to counter terrorism. In assessing Australia's counter-terrorism laws, the author analyses the text of the laws as well as how the laws have been applied in individual cases. This approach ensures that the formal legal rules are assessed against the reality of how those rules are applied in practice.<sup>9</sup>

**The first criterion** requires that a legitimate authority decide on the entrance into war.

Applying this criterion to Australia's counter-terrorism laws it can be seen that the laws are the result of legal and democratic processes, and that they require powers to be exercised by legitimate persons.

#### *Australia's counter-terrorism laws and the democratic process*

All of Australia's counter-terrorism laws have been made under the authority of the Australian Parliament by or in accordance with an Act of Parliament. Australia's counter-terrorism laws did not have effect until they had been passed by both Houses of Parliament and received Royal Assent from the Governor-General. In passing the counter-terrorism laws, the Australian Parliament assessed all proposed laws for their consistency with the rights and freedoms in the seven core human rights treaties to which Australia is a party.<sup>10</sup> In

<sup>8</sup> U Steinhoff, *On the Ethics of War and Terrorism* (Oxford University Press 2007) 2-3

<sup>9</sup> This approach applies the casuistic method favoured by Walzer. See M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* 2<sup>nd</sup> ed (Basic Books 1992).

<sup>10</sup> *International Covenant on Civil and Political Rights* 1966, *International Covenant on Economic, Social and Cultural Rights* 1966, *International Convention on the Elimination of All Forms of Racial Discrimination* 1965, *Convention on the Elimination of All Forms of Discrimination against Women* 1979, *Convention against Torture and Other Cruel, Inhuman or*

this respect, the elected representatives of the Australian people voted in favour of the proposed laws following discussion and debate. In many cases Parliamentary committees considered proposed laws and made recommendations for their amendment before they were passed.

The robustness of the parliamentary process in enacting Australia's counter-terrorism laws has been the subject of criticism, particularly for the speed with which the government sought to have the bills passed through both Houses of Parliament. Williams states that:

Those sponsoring the new measures sought to see them passed by Parliament as quickly and with as little scrutiny as possible. This was despite the fact that the Howard government itself recognised the benefits of robust parliamentary scrutiny and debate after this first set of Bills had been passed. After having been forced to accept significant changes in line with the recommendations of the unanimous Senate Committee report, Prime Minister John Howard stated in response at a National Press Club Address on 11 September 2002 that 'through the great parliamentary processes that this country has I believe that we have got the balance right'.<sup>11</sup>

However, despite the speed with which some of the counter-terrorism laws were enacted, as Williams notes, from the very beginning Australia's counter-terrorism laws were subject to inquiry by Parliamentary committees – a process that in some cases resulted in significant changes in response to committee recommendations.<sup>12</sup>

*Legitimate authority: requirements for the exercise of powers under Australia's counter-terrorism laws*

Australia's counter-terrorism laws mandate that only certain persons (such as police, intelligence officers and defence force members) are legitimate persons to exercise counter-terrorism powers. It is only these persons who have been authorised to exercise powers under the laws. For example, only police officers are authorised to exercise the counter-terrorism powers under Division 3A of Part 1AA of the *Crimes Act 1914* (Cth).<sup>13</sup>

Australia's counter-terrorism laws strictly prescribe the circumstances in which authorised officers can exercise powers. A legitimate authority must first authorise the use of certain powers available under the laws before an authorised officer can exercise those powers. Before police and intelligence officers, and defence force members, can exercise the vast majority of powers under Australia's counter-terrorism laws, they must first receive authority to do so from the executive and/or judicial branches of government in accordance with the approval processes under the laws.

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*Degrading Treatment or Punishment 1984, Convention on the Rights of the Child 1989 and Convention on the Rights of Persons with Disabilities 2006*

<sup>11</sup> G Williams 'A Decade of Australian Anti-Terror Laws' *Melbourne University Law Review* (2011) 35, 1136-1176 at 1164 (citations omitted).

<sup>12</sup> The findings of Parliamentary committees and the influence of their recommendations on the law making process for Australia's counter-terrorism laws is discussed below.

<sup>13</sup> These powers include searches, seizures, forensic examinations and the detention of individuals in relation to terrorist acts and terrorism offences.

For example, before a questioning warrant authorising compulsory questioning by the Australian Security Intelligence Organisation (ASIO)<sup>14</sup> can be issued, there are several levels of official endorsement of the warrant application. The steps in the process include that ASIO may only request a warrant where the Attorney-General has given his or her consent and the warrant can only be issued by a federal judge.<sup>15</sup>

**The second criterion** requires there to be a just cause for entering into a war. Applying this criterion to Australia's counter-terrorism laws it can be seen that Australia has international obligations to counter terrorism, including through domestic laws. Parliament must be convinced of the just cause for the counter-terrorism laws in order to vote in favour of them being enacted. The laws must also be for a just cause in so far as the Parliament must have legislative competency to make the laws under *the Constitution*.

*A just cause and Australia's counter-terrorism laws: Australia's international obligations to protect life, liberty and security of person*

The Australian government has an obligation to take reasonable steps to protect the human rights of people under its jurisdiction from threats posed by others, including the rights to life, liberty and security of person guaranteed by the *International Covenant on Civil and Political Rights 1966*.<sup>16</sup> States must take prospective measures to prevent future injury and retrospective measures such as enforcement of criminal law in response to past injury. States have particular duties to counter terrorism, including a duty to protect the right to liberty of person against deprivation by third parties and to take appropriate measures for the purposes of protecting individuals against terrorist groups operating unlawfully within their territory.<sup>17</sup> In defence of Australia's enactment of counter-terrorism laws, Williams states:

...[T]he criminal law in place in 2001 was not sufficient for the task of preventing terrorist attacks. ...given the potential for catastrophic damage and loss of life, intervention to prevent terrorism is justified at an earlier point in the chain of events that might lead to an attack. Such prevention can be seen as an act of political pragmatism given the pressing need to protect the community from terrorism. It can also be seen as a measure designed to respect fundamental human rights, including the right to life and to live free of fear.<sup>18</sup>

*A just cause and Australia's counter-terrorism laws: Australia's international obligations to protect international peace and security*

The Australian government has international obligations to protect international peace and security, including through the enactment and application of domestic counter-terrorism

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<sup>14</sup> A questioning warrant provides ASIO with the power to compel a person to answer questions to assist ASIO to collect intelligence in relation to a terrorism offence.

<sup>15</sup> Sections 34D and 34E of the *Australian Security Intelligence Organisation Act 1979* (Cth)

<sup>16</sup> Signed by Australia on 18th December 1972 and ratified on 13th August 1980. The right to life is guaranteed by Art 6, including the right to protection of life under Article 6(1) 'Every human being has the inherent right to life. This right shall be protected by law' and the right to liberty and security of person guaranteed by Article 9(1) 'Everyone has the right to liberty and security of person'.

<sup>17</sup> See UN Human Rights Committee, *General Comment No 6 (Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies)*, HRI/GEN/1/Rev.6 (1994) and *Draft General Comment No 35, Article 9: Liberty and security of person*, CCPR/C/107/R.3 (2013).

<sup>18</sup> G Williams 'Legal Legacy of the War on Terror' *Macquarie Law Journal* (2013) 12, 3-19 at 5

laws.<sup>19</sup> The former Independent National Security Legislation Monitor (INSLM), Bret Walker SC, reported to the Prime Minister that:

The enactment by the CT Laws of terrorism offences and of provisions facilitating investigation of them, together with important ancillary provisions such as secrecy of intelligence material, can most usefully be seen, for the purposes of assessing compliance with international law, as Australia's attempted compliance with Security Council Resolution 1373.

...

Investigation so far shows that Australia's conduct of enacting and enforcing the CT Laws has been undertaken expressly to comply with what Australia has recognized unequivocally to be the binding effect of 1373.<sup>20</sup>

With 1373, the UN Security Council acting under Chapter VII of the UN Charter could be said to have applied a just cause approach typically reserved for military interventions to justify a preventive approach to 'combat' terrorism. The UN Security Council acted under Chapter VII to decide that all Member States shall prevent terrorism on the basis that international terrorism represents a threat to international peace and security. In 1373, the UN Security Council reaffirmed the 'need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts' and also reaffirmed the 'inherent right of individual or collective self-defence'.<sup>21</sup>

The UN Security Council in 1373 required UN Member States to take proactive and preventive action individually and collectively against the commission of terrorist acts, placing a clear emphasis on cooperation between Member States. For example, para 2(b) requires all Member States to 'take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other states by exchange of information' and para 2(f) requires all Member States to 'afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings' relating to terrorist acts.

UN Member States are also required to take individual action, for example to 'prevent and suppress the financing of terrorist acts'<sup>22</sup> and to 'freeze without delay' the funds of persons who commit terrorist acts.<sup>23</sup> Each Member State is required to enact legislation to prosecute those who commit terrorist acts. For example, each Member State is required to 'ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice'.<sup>24</sup> In addition to any other measures against those persons, Member States must ensure such terrorist acts are 'established as

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<sup>19</sup> For a discussion of United Nations Member States' obligations to counter-terrorism, including through domestic legislation, see C H Powell, 'The UN, Terrorism and the Rule of Law' in V Ramraj, M Hor, K Roach and G Williams (eds) *Global Anti-Terrorism Law and Policy*, 2<sup>nd</sup> ed (Cambridge University Press, 2012) 19-43.

<sup>20</sup> Independent National Security Legislation Monitor, *Annual Report 16 December 2011*, 15-16

<sup>21</sup> 1373, preamble

<sup>22</sup> Paragraph 1(a) of 1373

<sup>23</sup> Paragraph 1(c) of 1373

<sup>24</sup> Paragraph 2(e) of 1373

serious criminal offences in domestic laws' and that the 'punishment duly reflects the seriousness of such terrorist acts'.<sup>25</sup>

As Australia's counter-terrorism laws are intended to implement UN authorised or endorsed measures, the authority of the UN supports the just cause for Australia's counter-terrorism laws. The UN Security Council resolutions on terrorism and the UN sectoral counter-terrorism treaties (which Australia's counter-terrorism laws are intended to implement) provide a legal and ethical basis for Australia's counter-terrorism laws. This supports an assessment that Australia's counter-terrorism laws have a just cause. However, while the authority of the UN does support an assessment that Australia's counter-terrorism laws have a just cause, it is not the end of the question.

Applying traditional just war theory to moral questions around the use of force for humanitarian purposes, Langan notes that multilateral approaches 'do show the gravity of a situation, and they prevent single powers from acting out their own moral and not so moral preferences. ...The UN provides an important legal framework for justifying and limiting intervention'. However, he warns that 'considerations of this type should not be taken as determinative in themselves'.<sup>26</sup>

This is particularly acute in the UN's counter-terrorism work, most notably because of a lack of a commonly agreed definition of terrorism and a lack of prescription as to what measures Member States should take. For example, 1373 does not define 'terrorist act' nor does it designate whose assets should be frozen. It is therefore unclear as to what measures are to be taken in response to UN counter-terrorism obligations, and how their appropriateness and proportionality are to be assessed. This has led to concerns that some Member States have not observed international human rights law in enacting domestic counter-terrorism laws and carrying out counter-terrorism activities.<sup>27</sup>

It is important that an assessment of the just cause for Australia's counter-terrorism laws includes an assessment of the compliance of the laws with all UN obligations, including international human rights obligations. The former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, notes:

Together with the responsibility of States to protect those within their jurisdiction from acts of terrorism, States have an obligation to comply with international law, including human rights law, refugee law and humanitarian law. ...Compliance with all human rights while countering terrorism represents a best practice because not only is this a legal obligation of, but it is also an indispensable part of a successful medium-and long-term strategy to combat terrorism.<sup>28</sup>

*Australia's counter-terrorism laws: the just cause for the laws must be supported by Parliament*

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<sup>25</sup> Paragraph 2(e) of 1373

<sup>26</sup> J Langan, 'Ethics and the International Politics of Rescue: Getting Beyond An American Solution for an International Problem' in *Righteous Violence: The Ethics and Politics of Military Intervention* (Melbourne University Press 2005) 13

<sup>27</sup> See the 2012 Report by Human Rights Watch *In the Name of Security: Counterterrorism Laws Worldwide since September 11* and S Marks, 'International Law and the 'War on Terrorism': Post 9/11 Responses by the United States and Asia Pacific Countries' *Asia Pacific Law Review* (2006) 14(1) 43-74.

<sup>28</sup> Martin Scheinin, *Report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, 2010, A/HRC/16/51, paragraph 12 (citations omitted).



There must have been justification for the counter-terrorism laws for members of Parliament to be satisfied that they should vote to pass the laws. Parliament has included in Australia's counter-terrorism laws the requirement for independent review of the laws after enactment<sup>29</sup> and for certain of the powers to sunset.<sup>30</sup> The just cause for Australia's counter-terrorism laws is therefore considered not only during enactment but also on an ongoing basis by Parliament.

If Parliament no longer believes there to be a just cause for Australia's counter-terrorism laws then Parliament may vote to amend or repeal the laws, or to allow them to sunset. Parliament has used sunset clauses as a time limit on some of Australia's counter-terrorism laws, requiring further justification and debate in Parliament in order for their continuation to be approved. For example, the *ASIO Legislation Amendment (Terrorism) Act 2002* (Cth) introduced Division 3 of Part III into the *Australian Security Intelligence Organisation Act 1979* (Cth), providing ASIO with questioning and detention powers in relation to terrorism offences. A sunset provision provided the provisions would cease to be in force from 23 July 2006<sup>31</sup> and in 2005, the Parliamentary Joint Committee on ASIO, ASIS and DSD conducted a review of Division 3 of Part III.

While the Parliamentary Committee supported the just cause for the provisions, the Committee recommended that a further sunset clause be included in the legislation to provide another opportunity for review. The government agreed that there should be a sunset clause and further review by the Committee and extended the sunset period by 10 years. The *ASIO Legislation Amendment Act 2006* (Cth) introduced a sunset clause that Division 3 of Part III 'ceases to have effect on 22 July 2016'.<sup>32</sup> The Act also amended paragraph 29(1)(bb) of the *Intelligence Services Act 2001* (Cth) to require the Parliamentary Joint Committee to review the operation, effectiveness, and implications of the Division 3 powers and for the Committee to report to the Parliament by 22 January 2016.

The Senate made amendments to the proposed *Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]* (Cth) which required a public and independent review of the operation, effectiveness and implications of the laws, following the third anniversary of the commencement of the laws.<sup>33</sup>

Parliament has amended Australia's counter-terrorism laws in response to the recommendations of independent reviewers. For example, accepting a recommendation by an independent reviewer, Parliament voted to amend the pre-charge questioning and

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<sup>29</sup> For example, the Senate made amendments to the proposed *Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]* which required a public and independent review of the operation, effectiveness and implications of the laws, following the third anniversary of the commencement of the laws. See also the statutory functions of the Independent National Security Legislation Monitor to review the counter-terrorism laws under the *Independent National Security Legislation Monitor Act 2010* (Cth).

<sup>30</sup> ASIO's questioning and detention powers will cease to have effect on 22 July 2016 (section 34ZZ of the *Australian Security Intelligence Organisation Act 1979* (Cth)). The control order and preventative detention order provisions under the Criminal Code expire on 16 December 2015 (sections 104.32 and 105.53). The powers in relation to terrorist acts and terrorism offences under the Crimes Act can no longer be exercised after the end of the sunset period on 16 December 2015 (section 3UK of the Crimes Act).

<sup>31</sup> Section 34Y of the *Australian Security Intelligence Organisation Act 1979* (Cth)

<sup>32</sup> Section 34ZZ of the *Australian Security Intelligence Organisation Act 1979* (Cth)

<sup>33</sup> The Council of Australian Governments (COAG) undertook this review. The review commenced on 6 August 2012. The Commonwealth Attorney-General tabled the Final Report of the COAG Review of Counter-Terrorism Legislation in Parliament on 14 May 2013. The government has not yet responded to the Committee's Report.

detention powers under the *Crimes Act 1914* (Cth) in relation to a person arrested for a Commonwealth terrorism offence.<sup>34</sup> As originally enacted by Parliament the legislation did not provide a cap on the amount of time that could be discounted from the maximum detention period to facilitate police investigations. The Parliament amended the provision to provide a seven-day cap on the amount of time that could be discounted.<sup>35</sup> This amendment shows that the unlimited time originally given to police to investigate a terrorism offence while detaining a suspect for questioning was no longer accepted by the Parliament as being justified.

### *Legislative competency to make Australia's counter-terrorism laws*

Also of relevance to the just cause criterion is the requirement that Parliament have legislative competency in regards to Australia's counter-terrorism laws. The Australian Parliament has the power to make laws for the peace, order, and good government of the Commonwealth with respect to the matters set out in section 51 of *the Constitution*, including for the defence of the Commonwealth and in relation to external affairs, as well as implied powers including what is commonly described as the nationhood power.

**The third criterion** requires that one pursue the war with the right intention. Applying this criterion to Australia's counter-terrorism laws it can be seen that the government has stated that the laws have been made for the purposes of complying with Australia's international obligations to counter terrorism. The former INSLM, Bret Walker SC, found this in fact to be the case. The intended effect and purpose of Australia's counter-terrorism laws was debated in Parliament and statutory reviews are required to ensure the laws have their intended effect and purpose. The laws are also explicitly linked to the prevention and investigation of terrorism, and the prosecution and punishment of terrorism.

### *Parliamentary consideration of the intended effect and purpose of Australia's counter-terrorism laws*

The intended effect and purpose of Australia's counter-terrorism laws was debated before Parliament (and through Parliamentary committee inquiries) and the laws were in many cases subject to amendment before enactment. As noted above, the Senate required an amendment providing for the regular review of Australia's counter-terrorism laws as enacted to ensure they had their intended effect and purpose. The Senate was unwilling to pass the proposed laws until the amendments were made and as such the laws as enacted included the Senate proposed amendment requiring independent review of their operation once enacted.

### *Independent reviews of Australia's counter-terrorism laws to ensure they are being used for their intended purposes*

Australia's counter-terrorism laws must not be used for matters unrelated to terrorism and national security. It is a statutory function of the INSLM to assess on an ongoing basis

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<sup>34</sup> See the Hon John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (2008) 249. Dr Haneef was arrested for a terrorism offence and held under the Crimes Act provisions (as originally enacted) for twelve days. This was legally permissible as there was no cap on the amount of time that could be discounted from the maximum detention period (the discounted time being allowed for the purposes of facilitating police investigations).

<sup>35</sup> Subsection 23DB(11) of the Crimes Act sets a seven-day cap on the amount of time that may be specified as not counting towards the 'investigation period', making the period of permissible detention for a person arrested for a terrorism offence eight days (as the 'investigation period' is a maximum of 24 hours: paragraph 23DB(5)(b) and subsection 23DF(7) of the Crimes Act).

whether the laws are being used for matters unrelated to terrorism and national security.<sup>36</sup> The former INSLM, Bret Walker SC, described this role as an ‘important watchdog task’<sup>37</sup> and in each reporting period during his term, the former INSLM assessed that Australia’s counter-terrorism laws were not being used for matters unrelated to terrorism and national security.<sup>38</sup> If the laws were used for unintended purposes then administrative or judicial review could be available to contest such an application.

### *The language of Australia’s counter-terrorism laws and their explicit link to countering terrorism*

Australia’s counter-terrorism laws are explicitly linked to the prevention and investigation of terrorism, and the prosecution and punishment of terrorism. For example, a court can only issue a control order<sup>39</sup> if satisfied on the balance of probabilities that making the order ‘would substantially assist in preventing a terrorist act’ or if ‘the person has provided training to, or received training from, a listed terrorist organisation’.<sup>40</sup>

The definition of ‘terrorist act’ under the *Criminal Code Act 1995* (Cth) has been described by the former INSLM, Bret Walker SC, as ‘world best’ for its exclusion from the definition of terrorist act that which is advocacy, protest, dissent or industrial action where it is not intended to cause danger to life or limb.<sup>41</sup> As noted above, the former INSLM found that Australia’s conduct of enacting and enforcing the counter-terrorism laws has been undertaken expressly to comply with Australia’s counter-terrorism obligations under 1373.<sup>42</sup>

The provisions of Australia’s counter-terrorism laws expressly require a link to countering terrorism before powers can be exercised. For example, it is only for the protection of public safety and security that police may search a person who is in an area that has been designated as a prescribed security zone in response to a terrorist act.<sup>43</sup> Given the connection to the prevention, investigation and prosecution of terrorist acts, this can be seen as for a just cause or pursued for the right intention for the purposes of achieving counter-terrorism objectives.

While there are some instances where a person innocent of any criminal involvement in terrorism may have a measure imposed on them, the measure must be proportionate and necessary for the purposes of the investigation and prosecution of a terrorist offence.<sup>44</sup> For

<sup>36</sup> This is a statutory review function of the Independent National Security Legislation Monitor under paragraph 6(1)(d) of the *Independent National Security Legislation Monitor Act 2010* (Cth). The Monitor reports annually to the Prime Minister on (amongst other things) whether Australia’s counter-terrorism laws have been used for matters unrelated to terrorism and national security. The Inspector General of Intelligence and Security, the Commonwealth Ombudsman and the Australian Commissioner for Law Enforcement Integrity also review the legality and propriety of actions taken under Australia’s counter-terrorism laws.

<sup>37</sup> Independent National Security Legislation Monitor, *Annual Report 16 December 2011*, 1

<sup>38</sup> Independent National Security Legislation Monitor, *Annual Report 16 December 2011*, 2; Independent National Security Legislation Monitor, *Annual Report 20 December 2012*, 2 and Independent National Security Legislation Monitor, *Annual Report 7 November 2013*, 3; Independent National Security Legislation Monitor, *Annual Report 28 March 2014*, 3

<sup>39</sup> A control order is issued by a court and imposes certain restrictions, obligations and prohibitions on a person as are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act. A control order can restrain personal liberty in a number of ways, as set out in the exhaustive list in subsection 104.5(3) of the *Criminal Code Act 1995* (Cth). Orders can include prohibitions on the person carrying out work or study or communicating with specified persons as well as the imposition of curfews and an obligation to wear a tracking device.

<sup>40</sup> Paragraph 104.4(1)(c) of the *Criminal Code Act 1995* (Cth)

<sup>41</sup> Independent National Security Legislation Monitor, *Annual Report 16 December 2011*, 124

<sup>42</sup> Independent National Security Legislation Monitor, *Annual Report 16 December 2011*, 15-16

<sup>43</sup> See the provisions of Division 3A of Part 1AA of the *Crimes Act 1914* (Cth)

<sup>44</sup> This could be seen through the lens of the just war theory concept of collateral damage whereby the harming of innocent persons may be morally permissible. Although the author shares the views of Nathanson in regards to the moral problems of collateral damage. See S Nathanson, *Terrorism and the Ethics of War* (Cambridge University Press 2010) Ch 7.

example, a person may be detained to preserve evidence of a terrorist act regardless of whether they had any involvement in the act. A preventative detention order empowers the police to detain a person for up to 48 hours where a terrorist act has occurred in the last 28 days and it is necessary to detain the person to preserve evidence relating to a terrorist act. The period of detention under an order must be reasonably necessary to preserve the evidence.<sup>45</sup>

The **fourth criterion** requires that the war fulfils the condition of proportionality. Applying this criterion to Australia's counter-terrorism laws it can be seen that Australia's international obligations require the counter-terrorism laws to be proportionate, and that provisions of the counter-terrorism laws themselves contain requirements for proportionality assessments to be made before a power can be exercised.

*The initial and ongoing assessment of the proportionality of Australia's counter-terrorism laws to the threat of terrorism and to national security*

Australia's international human rights obligations require Australia's counter-terrorism laws to be proportionate. For example, the right to liberty of movement under Article 12 of the *International Covenant on Civil and Political Rights 1966* can only be restricted to the extent necessary to protect national security. The *Parliamentary Scrutiny Act 2011* (Cth) established the Parliamentary Joint Committee on Human Rights. The Committee has the power to examine Australia's counter-terrorism laws for compatibility with human rights, and to report to both Houses of the Parliament on that issue.<sup>46</sup> The Inspector-General of Intelligence and Security (IGIS) oversees and reviews the legality and propriety of the activities of Australia's intelligence and security agencies, including whether the activities are conducted in a way that is consistent with human rights.

During its consideration of each proposed counter-terrorism law, the Parliament considered and debated the principles and purposes of the bill including its necessity. The Parliament considered the text of the bill and whether the provisions of the bill were an appropriate means of achieving its objectives. Bills were referred to Parliamentary committees which conducted inquiries and made recommendations to the Parliament.

Parliamentary committees assessed the proposed laws against a set of accountability standards including the effect of the proposed laws on individual rights, liberties and obligations and reported to Parliament on their findings.<sup>47</sup> As discussed above, throughout the process amendments were made to the proposed laws. For example, the Senate Legal and Constitutional Legislation Committee recommended that the *Anti-Terrorism Bill (No. 2) 2005* be amended to include oversight of the proposed preventative detention regime by the Commonwealth Ombudsman.<sup>48</sup> The Bill was subsequently amended to provide for oversight of the preventative detention regime by the Ombudsman.

It is a statutory function of the INSLM to conduct ongoing, independent reviews of Australia's counter-terrorism laws and to report annually to the Prime Minister on the findings of the

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<sup>45</sup> Section 105.4 of the *Criminal Code Act 1995* (Cth)

<sup>46</sup> Section 7 of the *Parliamentary Scrutiny Act 2011* (Cth). The Act also requires all proposed laws introduced into Parliament to have an accompanying statement of compatibility outlining how the proposed law complies with Australia's international obligations, including provisions of the *International Covenant on Civil and Political Rights 1966*.

<sup>47</sup> Including the Joint Parliamentary Committee on Human Rights, Joint Parliamentary Committee on Intelligence and Security, Senate Legal and Constitutional Legislation Committee and Senate Scrutiny of Bills Committee.

<sup>48</sup> *Inquiry into the Provisions of the Anti-Terrorism Bill (No. 2) 2005*, 28 November 2005, Recommendation 9

reviews, including recommendations for reform. The INSLM reviews the laws for their compliance with Australia's international obligations and considers whether the laws contain appropriate safeguards for protecting the rights of individuals, remain proportionate to the threat of terrorism or threat to national security and remain necessary.<sup>49</sup>

### *Proportionality requirements under Australia's counter-terrorism laws*

Australia's counter-terrorism laws require a proportionality assessment to be undertaken prior to the exercise of the vast majority of powers available under the laws. For example, legally binding Guidelines issued by the Attorney-General state that ASIO can only apply for a questioning warrant<sup>50</sup> where it is proportionate to use this method of information gathering. The Guidelines require ASIO to have regard to the proportionality and intrusiveness of its methods of obtaining information. Any means used for obtaining information must be (a) proportionate to the gravity of the threat posed and the probability of its occurrence, (b) use as little intrusion into individual privacy as is possible and (c) wherever possible the least intrusive techniques of information collection should be used before more intrusive techniques.<sup>51</sup>

The application by ASIO of the principle of proportionality has been reviewed by the IGIS. The IGIS, Dr Vivienne Thom, states that '[t]he office regularly examines selected agency records to ensure that the activities of the AIC agencies comply with the relevant legislative and policy frameworks'.<sup>52</sup> Specifically, that the IGIS has reviewed whether 'ASIO is applying the principle of proportionality to its investigation; beginning with less intrusive methods (where possible) and progressing to increasingly intrusive methods only as required'.<sup>53</sup> In doing so, the IGIS reviewed investigative cases for a) 'the justification and objectives provided for the investigation', b) 'whether investigative activities were appropriate' and c) 'whether investigations were subject to formal approval and periodic review'.<sup>54</sup>

Applying the principle of proportionality to Australia's counter-terrorism laws it can be seen that measures taken must be proportionate and respect the rights and freedoms guaranteed under the *International Covenant on Civil and Political Rights 1966*.<sup>55</sup> The former INSLM, Bret Walker SC, described Australia's counter-terrorism laws as being directed at 'ensuring that persons accused of terrorism, and others caught up in its prevention or investigation, are accorded full and equal protections in an appropriate balance with public order and national security in a democratic society'.<sup>56</sup>

For example, in determining whether conditions to be imposed under a control order are reasonably necessary for the protection of public safety a judge is required to undertake a

<sup>49</sup> These are statutory review functions of the Independent National Security Legislation Monitor under subsection 6(1) and section 8 of *Independent National Security Legislation Monitor Act 2010* (Cth).

<sup>50</sup> A questioning warrant provides ASIO with the power to compel a person to answer questions to assist ASIO to collect intelligence in relation to a terrorism offence.

<sup>51</sup> *Attorney-General's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence)* paragraph 10.4. The Guidelines are given by the Attorney-General to the Director-General of ASIO under subsections 8A(1) and 8A(2) of the *Australian Security Intelligence Organisation Act 1979* (Cth) and must be observed by ASIO in the performance of its functions.

<sup>52</sup> Inspector-General of Intelligence and Security, *Annual Report 2012-13*, 16

<sup>53</sup> Inspector-General of Intelligence and Security, *Annual Report 2012-13*, 17

<sup>54</sup> Inspector-General of Intelligence and Security, *Annual Report 2012-13*, 17

<sup>55</sup> See C Gearty, *Civil Liberties* (Oxford University Press 2007) 88-95

<sup>56</sup> Independent National Security Legislation Monitor, *Annual Report 16 December 2011*, 19

proportionality assessment. The terms of a control order must be reasonably necessary and reasonably appropriate and adapted to protect the public from a terrorist act, and the court must take into account the impact of the terms of the order on the personal and financial circumstances of the person against whom it is sought.<sup>57</sup> While this is the formal position, the operation of the provisions in practice has been somewhat different. The former INSLM, Bret Walker SC, found the following in relation to the interim control order made against David Hicks:

His Honour made the interim CO against Hicks in the exact terms sought by the AFP after finding them to be reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act. His Honour noted that he was required under subsec 104.4(2) of the Code to take into account the impact of the terms of the CO on Hicks' financial and personal circumstances but stated he was "hampered in these interim proceedings by not having any evidence either from or produced on behalf of the Respondent." Notwithstanding the lack of evidence of Hicks' personal and financial circumstances, his Honour repeatedly stated there was no evidence before him of the impact each term would have on Hicks such that it would dissuade him from making the order in the terms sought. It is not clear how his Honour made an assessment of the impact on Hicks' personal and financial circumstances when there was no evidence about those matters of any material detail before him on this point – and the applicant bore the onus of proof.<sup>58</sup>

The **fifth criterion** requires that the war fulfil the condition of having prospects of success. Applying this criterion to Australia's counter-terrorism laws it can be seen that during the law-making process, the Parliament considers whether Australia's counter-terrorism laws have prospects of success. The legal thresholds for exercise of powers under the laws also involve a consideration of the prospects of success.

*Australia's counter-terrorism laws: the law-making process and prospects of success*

During the law-making process, Australia's counter-terrorism laws were assessed against the notion that there must be prospects of success. The originating bills for all of the counter-terrorism laws had accompanying explanatory material to explain why the proposed laws were necessary, and how they were intended to operate to achieve their purpose. If proposed laws could not be seen as having prospects of success in countering terrorism, parliamentarians were unlikely to have been satisfied that the proposed laws were necessary, and may not have voted in favour of the proposed laws.

As noted above, Australia's counter-terrorism laws have a history of referral to Parliamentary committees for review of their necessity and whether their operation will be effective in achieving their objectives. In 2013, the Parliamentary Joint Committee on Intelligence and Security completed an inquiry into proposed new counter-terrorism and national security laws.<sup>59</sup> The Terms of reference required the Committee to have regard to the 'desirability of comprehensive, consistent and workable laws to protect the security and safety of Australia [and] the need to ensure that intelligence, security and law enforcement agencies are

<sup>57</sup> Section 104.4 of the *Criminal Code Act 1995* (Cth). See the High Court of Australia's judgment in *Thomas v Mowbray* (2007) 233 CLR 307. In this case, the control order provisions were held to be constitutionally valid as an exercise of the power to legislate for the defence of the Commonwealth and were held not to infringe the limits on judicial power.

<sup>58</sup> Independent National Security Legislation Monitor, *Annual Report 20 December 2012*, 23 (citations omitted)

<sup>59</sup> *Inquiry into Potential Reforms of Australia's National Security Legislation*

equipped to effectively perform their functions and cooperate effectively in today's and tomorrow's technologically advanced and globalised environment'. The Committee was also required to consider the 'effectiveness and implications of the [law reform] proposals to ensure law enforcement, intelligence and security agencies can meet the challenges of new and emerging technologies upon agencies' capabilities'. The Committee was further required to consider whether the proposed laws will 'mitigat[e] the [national security] risks identified as issues requiring the legislative change' and 'enhanc[e] the operational capacity of Australian intelligence community agencies'.

*Prospects of success and the legal thresholds for the exercise of powers under Australia's counter-terrorism laws*

The legal thresholds for the exercise of powers under Australia's counter-terrorism laws involve a consideration of their prospects of success. For example, before a judge can issue an ASIO questioning warrant he or she must be satisfied that there are reasonable grounds for believing that it will substantially assist the collection of intelligence that is important in relation to a terrorism offence.<sup>60</sup> The Director-General of ASIO is under a statutory obligation to report to the Commonwealth Attorney-General in the case of each questioning warrant issued. The Director-General must report on the extent to which questioning under the warrant assisted ASIO in carrying out its functions. The former INSLM, Bret Walker SC, describes this requirement as:

This statutory reporting requirement is for the purposes of accounting for the exercise of the questioning powers and providing an understanding ultimately by the legislators and specifically by the Attorney-General, of the usefulness of these powers. The theory of such an accountability mechanism includes the facility it provides Parliament to make a decision whether to continue to have these powers. This makes it a very significant safeguard both in constitutional and political terms.<sup>61</sup>

Such reporting obligations are an important accountability mechanism under Australia's counter-terrorism laws. The reports provide information to Ministers and Parliament to enable them to make informed decisions on the success of the laws and their ongoing appropriateness and effectiveness.

Prospects of success are also considered in prosecutorial decisions. In determining whether there is sufficient evidence to prosecute a terrorism case, the prosecutor must be satisfied that there is *prima facie* evidence of the elements of the terrorism offence, and a reasonable prospect of obtaining a conviction.<sup>62</sup>

The **sixth criterion** requires that the war is a last resort. Applying this criterion to Australia's counter-terrorism laws it can be seen that the principle of last resort is applied to the law-making process for the laws and that the thresholds for the exercise of powers under the laws apply the principle of last resort.

*The principle of last resort and the law-making process for Australia's counter-terrorism laws*

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<sup>60</sup> Sections 34D and 34E of the *Australian Security Intelligence Organisation Act 1979* (Cth)

<sup>61</sup> Independent National Security Legislation Monitor, *Annual Report 20 December 2012*, 96

<sup>62</sup> Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*

The principle of last resort is applied to the law-making process for Australia's counter-terrorism laws, including through Parliamentary committee processes. For example, the Parliamentary Joint Committee on Intelligence and Security recommended that Parliament not pass proposed amendments to facilitate the use of ASIO warrants until the amendments 'acknowledge the exceptional nature and very limited circumstances in which the power should be exercised'.<sup>63</sup>

#### *Australia's counter-terrorism laws apply the principle of last resort*

As Lee notes, the principle of last resort is related to proportionality because it is also based on 'the consequentialist concern to limit harm'.<sup>64</sup> The principle of last resort is embodied in Australia's counter-terrorism laws. For example, a warrant authorising ASIO to require a person to answer questions can only be issued as a last resort where relying on other methods of intelligence collection 'would be ineffective'.<sup>65</sup> In order to be satisfied of this prerequisite, ASIO would be required to provide evidence to the Attorney-General and a judge that it had assessed all other methods of intelligence collection to be ineffective. ASIO would have to first attempt to collect the intelligence through other means but fail to do so before it could meet this legal threshold. In this way, the principle of last resort is upheld because the alternative means of achieving the goal of collecting the intelligence must first be ineffective before the power is available to be used. The legislation specifically provides that the alternative means that would produce less harm (as they are less intrusive to the individual) must first be proven to be ineffective before the last resort power can be used.

#### **Challenges of applying an adapted just war theory framework**

It is the author's conclusion that Australia's counter-terrorism laws can be read as consistent with the adapted just war theory framework, however, there may be contesting interpretations as to whether the laws are consistent with any or all of the adapted just war theory criteria. Depending on the perspective taken when assessing each of the criteria, such as which factors are considered in the assessment and the relative importance attributed to them, different persons would likely form different conclusions as a result of that assessment even where the same criteria formed the basis of the assessment. This is because the way in which each criteria is analysed and assessed will differ between interested persons, as the following examples show.

For the first criterion, different persons may reach different answers as to the question of who is considered a 'legitimate person' for the purposes of authorising a particular power. The nature of the counter-terrorism power being authorised, and the impact of authorised measures, will influence assessments as to the legitimacy of the decision-maker. For example, while a parliamentarian may consider that a senior public servant is a legitimate person to authorise certain activities that would by their nature impinge on or restrict rights, other interested persons (for example, some members of certain human rights, ethnic or other issue-based organisations) may not agree on the legitimacy of such persons to make these decisions.

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<sup>63</sup> Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Potential Reforms of Australia's National Security Legislation* (Parliamentary Paper 170/2013, 2013) Recommendation 35

<sup>64</sup> S Lee 'Preventive Intervention' in S Lee (ed) *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory* (Springer 2007), 125

<sup>65</sup> Paragraph 34D(4)(b) of the *Australian Security Intelligence Organisation Act 1979* (Cth)



The *National Security Legislation Amendment Bill (No 1) 2014* contains provisions to amend the *Australian Security Intelligence Organisation Act 1979* (Cth) to introduce a statutory framework for ASIO to conduct Special Intelligence Operations (SIOs). The amendment would govern the engagement of ASIO officers and 'ASIO affiliates' in authorised, covert activities that involve otherwise unlawful conduct for the purpose of carrying out ASIO's statutory functions. The proposed SIO scheme would provide protection from criminal and civil liability for certain activities engaged in by ASIO officers and 'affiliates' during a SIO.

The proposed SIO scheme is somewhat similar to the controlled operations scheme that operates to provide limited legal immunity in relation to activities by the Australian Federal Police (AFP) and 'civilian participants' during undercover police operations. The AFP scheme requires an external authority (an Administrative Appeals Tribunal (AAT) member nominated by the Attorney-General) to approve the extension of a controlled operation beyond three months. Unlike that scheme, the proposed SIO scheme would authorise senior ASIO officers to authorise the SIOs for periods of up to 12 months at a time, with no external approval process.

The Explanatory Memorandum to the *National Security Legislation Amendment Bill (No 1) 2014* describes the SIO scheme as being 'similar to the controlled operations regime...with appropriate modifications to reflect the discrete purposes to which SIOs and controlled operations are directed...'.<sup>66</sup> These discrete purposes are said to be the 'collection of intelligence for national security purposes' on the one hand and the 'gathering of evidence in relation to serious criminal offences for law enforcement purposes' on the other.<sup>67</sup>

The Explanatory Memorandum offers no satisfactory justification for why SIOs require a different authorisation process to AFP controlled operations. There is no explanation as to why it is appropriate that police investigating serious crimes (including terrorism) require authorisation from an AAT member for controlled operations extending beyond three months whereas ASIO requires no external authorisation for SIOs extending up to 12 months. The Explanatory Memorandum accompanying the proposed SIO provisions states:

The authorisation process for an SIO is internal to the Organisation, which appropriately reflects the fact that the conduct of SIOs is an internal, operational matter, on which the Director-General or a Deputy Director-General is best placed to make decisions given their detailed awareness of the security environment, and their practical expertise in relation to the conduct of intelligence operations. The internal authorisation process established by Division 4 is further necessary to facilitate operational efficiency and protect the security of covert intelligence operations. In addition to the scrutiny of an application by the authorising officer (who holds an appropriately senior position within the Organisation), accountability and oversight arrangements are given effect via reporting requirements. ...In short, these provisions establish, respectively, the Organisation's reporting requirements to the Minister and the IGIS on the exercise of powers under Division 4, and a reporting requirement to the Parliament as part of the Organisation's annual report.<sup>68</sup>

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<sup>66</sup> *Explanatory Memorandum, National Security Legislation Amendment Bill (No 1) 2014*, 14

<sup>67</sup> *Explanatory Memorandum, National Security Legislation Amendment Bill (No 1) 2014*, 14

<sup>68</sup> *Explanatory Memorandum, National Security Legislation Amendment Bill (No 1) 2014*, 101

However, the conduct of SIOs would not be merely 'internal' to ASIO as is claimed. Such operations would by definition involve the conduct of activities that would otherwise be criminal and have been made illegal by the Parliament due to their potential impacts on society and individuals. The proposed SIO scheme would provide immunity from criminal and civil liability for actions undertaken during these operations, with potentially very significant impact on society and individuals. Such immunity has the potential to prevent the prosecution of an ASIO officer or 'affiliate' for actions that would be criminal if done outside of a SIO. Such immunity also has the potential to prevent an individual from pursuing a civil claim (such as a claim for personal injury damages) in relation to the actions of ASIO officers or 'affiliates' in circumstances where those persons would ordinarily be subject to civil liability for their actions.

The same points made in favour of the internal authorisation scheme for SIOs could equally be made in support of internally approved controlled operations for the AFP. Namely, that the senior AFP officer is best placed to make decisions on these matters, the internal process would better protect the 'operational efficiency and protect the security' of the controlled operation, and that the AFP must report on the exercise of the controlled operations powers to the Minister (and through the Minister to Parliament), as well as to the Commonwealth Ombudsman.<sup>69</sup> There may well be reasons for why it is appropriate that the approving authority for SIOs is an internal ASIO officer rather than an AAT member or judge. However, without further information justifying this position it is open to interested persons to question whether or not an ASIO officer is a legitimate person to authorise such activity and contesting interpretations of who is a legitimate authority in this context are likely to arise.

The claim that an internal authorisation process is necessary for 'operational efficiency' is questionable. Assuming that the Director General or Deputy Director General of ASIO gives the application for an SIO a thorough and balanced consideration, there is no reason why an internal authorisation should be faster or cheaper to conduct than an external authorisation process by a judge, Minister or senior public servant external to ASIO.<sup>70</sup>

The nature of the decision to be made will also influence assessments as to the legitimacy of the decision-maker. In the SIO example, the decision-maker would be required under the proposed scheme to make a decision as to what is 'proportionate' to achieve the ends of the SIO (that is, to assist ASIO in achieving one or more special intelligence functions). An assessment as to whether it is legitimate for this decision to be made by a senior officer of ASIO could include questioning whether there would be a perception that the ASIO internal decision-maker would be biased and would be more likely than an external decision-maker to act in the interests of ASIO in an SIO authority decision. An assessment of legitimacy could include whether an independent third party decision-maker would be perceived to have more legitimacy. A third party decision-maker may be perceived to be more likely to make

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<sup>69</sup> The AFP must provide six-monthly and annual reports to the Minister and the Commonwealth Ombudsman. The annual report must be tabled in Parliament within 15 sitting days of receipt by the Minister (section 15HM of the *Crimes Act 1914* (Cth)). The Commonwealth Ombudsman states that: '[i]n addition to its complaint investigation function, the Ombudsman's office undertakes a variety of monitoring roles to ensure compliance with legislative requirements applying to selected law enforcement and regulatory activities. Under the *Telecommunications (Interception) Act 1979* and the *Crimes Act 1914*, the Ombudsman is responsible for monitoring the integrity of the records of telecommunications interceptions and controlled (covert) operations conducted by the Australian Federal Police (AFP) and the Australian Crime Commission (ACC)': *Commonwealth Ombudsman* [www.ombudsman.gov.au/pages/our-legislation/controlled-operations-and-surveillance-devices/](http://www.ombudsman.gov.au/pages/our-legislation/controlled-operations-and-surveillance-devices/)

<sup>70</sup> It is worth noting that there are existing provisions in the *Crimes Act* that facilitate timely external authorisation in emergency situations. For example, in relation to police warrants there are emergency provisions that enable applications for warrants to be made by telephone or other electronic means in an urgent case; or if the delay that would occur if an application were made in person would frustrate the effective execution of the warrant (section 3R of the *Crimes Act 1914* (Cth)).

a decision that takes into account and assesses fairly all of the different factors (for example, both the operational need for the SIO and the human rights implications) in determining an application.

The second criterion, which assesses just cause, also raises questions about differing perspectives. For example, the former INSLM, Bret Walker SC, acknowledged both the soundness of having laws to counter terrorism financing and Australia's international obligations to do so. However, he did not consider that 'just cause' to justify changes to the terrorism financing offences that would potentially impact on individual rights and charitable giving:

The INSLM is sympathetic to the burdensome position of the prosecution in proving a terrorism financing offence...but is not satisfied that the lowering of the fault elements to negligence or strict liability would be appropriate. The difficulty of proof associated with the offences as they currently stand is an acceptable trade-off for ensuring innocent conduct is not captured by the offence and charitable giving is not discouraged.<sup>71</sup>

The former INSLM acknowledged the prosecutorial difficulties in proving the current offences, however, he gave significant weight to the potential impact of any changes to the laws on individual rights and charitable giving. Representatives from the Muslim, Kurdish, Tamil and Somali communities expressed concerns about the terrorism offences at a community forum held in Melbourne in 2008. These concerns included that '[c]ommunities felt afraid to provide assistance to family and friends in their countries of origin for fear of being accused of providing assistance to alleged 'terrorist organisations''.<sup>72</sup>

The fourth criterion raises questions about the definition of proportionality. The basis on which individuals make proportionality assessments will vary due to differing values and priorities. Returning to the proposed SIO scheme example, members of ethnic communities may raise the concern that the proposed scheme is not a proportionate law from their perspective as it has the potential to have a disproportionate impact on them. At the 2008 community forum discussed above, representatives of the Kurdish, Tamil and Somali communities discussed how members of their communities 'felt targeted' by ASIO and were concerned about 'the breadth of the investigative and policing powers provided to authorities'.<sup>73</sup> On 29<sup>th</sup> August 2014, the Australian National Imams Council issued a press release titled *ANIC concerned about proposed anti-terrorism laws*, which states:

...In a recent press conference the Prime Minister called on "Team Australia" to get behind the proposed laws. ANIC believes that such language is unnecessarily divisive and sets those who have genuine concerns about the changes in direct conflict with the government. ...The government has before parliament proposals to grant ASIO greater powers including...immunity from prosecution to intelligence officers engaged in special operations. ANIC is concerned that increased powers will only increase the lack of accountability and oversight of intelligence officers. The

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<sup>71</sup> Independent National Security Legislation Monitor, *Annual Report 7<sup>th</sup> November 2013*, 51

<sup>72</sup> *Is Community a Crime? A Forum for Communities Affected by the Anti-Terrorism Laws and Policing*, Western Suburbs Legal Service, 2009, 4

<sup>73</sup> *Is Community a Crime? A Forum for Communities Affected by the Anti-Terrorism Laws and Policing*, Western Suburbs Legal Service, 2009, 4

prospect of these powers being abused in the absence of proper safeguards is of great concern.

### **Benefits of applying an adapted just war theory framework**

The proposed adapted just war theory framework provides a set of criteria that could be applied as a basis for public and parliamentary debate on the moral legitimacy of Australia's counter-terrorism laws. The framework could also be applied to inform decision-making in the development and application of Australia's counter-terrorism laws.

The framework could enable a structured debate to proceed between those with contesting views on the laws and facilitate a more productive and open dialogue between interested persons. This could enable persons to challenge propositions put forward in support of or against Australia's counter-terrorism laws. For example, it could allow persons to challenge the political discourse in support of the laws by discussing what is meant when a politician states that a law is 'necessary' or 'proportionate'. In discussing whether a law is proportionate each person could, applying the framework, clearly articulate what factors are relevant to their analysis of whether a law is proportionate, what importance is placed on those factors and why other factors were not considered as part of their analysis.

The benefits of a framework for assessing counter-terrorism laws can be shown through the example of the differing views reached by the Council of Australian Governments' (COAG) Review Committee and the former INSLM, Bret Walker SC, in their reviews of the counter-terrorism control order regime.<sup>74</sup> The COAG Review Terms of reference required the Committee to report on whether Australia's counter-terrorism laws are necessary and proportionate, effective against terrorism, are being exercised in a way that is evidence-based, intelligence-led and proportionate, and contain appropriate safeguards against abuse.<sup>75</sup> The Terms of reference for the Review are similar to the statutory remit of the INSLM, which is to review the counter-terrorism laws for their compliance with Australia's international obligations and to consider whether the laws contain appropriate safeguards for protecting the rights of individuals, remain proportionate to the threat of terrorism or threat to national security and remain necessary.<sup>76</sup>

It was against these similar criteria that the COAG Review Committee and the former INSLM reviewed the control order regime. The former INSLM did not find the control order regime consistent with the criteria whereas the COAG Review Committee found the regime would be consistent with the criteria if certain amendments were made. The former INSLM found the control order regime 'is not effective, not appropriate and not necessary'.<sup>77</sup> In contrast, the COAG Review Committee concluded that 'control orders are, for the time being,

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<sup>74</sup> The COAG Review of Counter-Terrorism Legislation was conducted by a Committee led by the Hon Anthony Whealy QC, a retired judge from the NSW Court of Appeal and included a number of senior federal and state public servants, including state and federal police officers and a prosecutor. The former INSLM, Bret Walker SC, was an independent statutory office holder.

<sup>75</sup> Terms of reference, COAG Review of Counter-Terrorism Legislation

<sup>76</sup> These are statutory review functions of the Independent National Security Legislation Monitor under subsection 6(1) and section 8 of *Independent National Security Legislation Monitor Act 2010* (Cth).

<sup>77</sup> Independent National Security Legislation Monitor, *Annual Report 20 December 2012*, 4

necessary and justified' (although the Committee also recommended that greater safeguards against abuse were necessary).<sup>78</sup>

This demonstrates that there can be differing interpretations and conclusions on what is necessary, appropriate or proportionate. As a comparable framework was used as the basis for assessing the laws in both reviews, interested persons are able to debate the merits of the findings of each report against one framework.<sup>79</sup> This provides an example of how the proposed adapted just war theory framework could be applied to provide a cohesive framework for assessing Australia's counter-terrorism laws in a way that takes into account all relevant criteria while also accommodating diverse viewpoints. By applying a shared framework, where conflicting views are reached against the same criteria, the framework can prompt further discussion of how and why these conflicting views were reached.

### **Applying just war theory as a framework to assess the moral legitimacy of states' legislative responses to counter terrorism**

This paper has aimed to show how an adapted just war theory framework can be used to assess Australia's counter-terrorism laws in a methodical way. It is proposed that the framework could aid discussion and debate of the moral legitimacy of Australia's counter-terrorism laws, by providing a clearly defined set of standards for assessing the laws in a way that considers all relevant criteria. It is also proposed that the framework could be used to inform decision-making in the development and application of Australia's counter-terrorism laws.

It is concluded that the framework could also be applied to assess the moral legitimacy of other states' legislative responses to counter terrorism, by evaluating the extent to which their laws are consistent with the adapted just war theory criteria. The requirement for a broadly applicable approach to assessing the legitimacy of counter-terrorism laws is reinforced by the lack of guidance provided by the UN Security Council as to how Member States should implement their international obligations to legislate to counter terrorism.<sup>80</sup>

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<sup>78</sup> *Final Report of the COAG Review of Counter-Terrorism Legislation*, 1 March 2013, 54

<sup>79</sup> It is argued that the criteria by which both the INSLM and COAG Review Committee assessed Australia's counter-terrorism laws would fall within the adapted just war theory-based framework.

<sup>80</sup> See for example the discussion above on the absence of a definition of terrorism in 1373.